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No. 1093.

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IN THE

Supreme Court of the United States

October Term, 1941

SAMUEL EVANS MASSENGILL,

Petitioner,

vs.

J. T. WILSON, Administrator of the Estate of Pearl Lockhart, deceased,

Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

This action was originally brought by Respondent in the District Court of the United States for the Eastern District of Tennessee, for wrongful death occurring in South Carolina, caused by Petitioner's gross negligence in manufacturing and widely distributing for sale to the public without adequate preliminary tests, and without proper warning labels, a deadly poison known as Elixir Sulfanilamide. Jurisdiction was obtained under diversity of citizenship, Petitioner being a citizen and resident of Bristol, Tennessee, Respondent a resident of South Carolina, and the amount involved being more than $3,000.00.

As alleged in the declaration, Pearl Locklair, a resident of Charleston, South Carolina, whose death is the subject of

this action, contracted a sore throat and under a doctor's prescription began taking this Elixir Sulfanilamide on September 24, 1937, and on October 4, 1937, as a result thereof, died in a hospital in Charleston, South Carolina. The Respondent, J. T. Wilson, also a resident of Charleston, South Carolina, after qualifying as Administrator of her estate in South Carolina, and as Ancillary Administrator in Tennessee, brought this suit on March 9, 1940, under the South Carolina death statutes, Sections 411, 412 and 413 of Title 5, Chapter 15, Code of Laws for the State of South Carolina for the year 1932. These statutes were enacted into law at the same time and in the same act, and were in effect at the time this cause of action arose. (Record page 8, Section 3). The Petitioner filed a plea relying upon Section 8595 of Williams Tennessee Code Annotated which provides a one year limitation from the date of the injury for personal injury actions. Respondent filed a motion to strike this plea, contending that Section 413 of the South Carolina Code of 1932 (which provides a six year limitation from the date of death for actions arising under said Section 411 of the South Carolina Code) controls, rather than said Tennessee Code Section 8595. (Record page 8).

The District Court overruled this motion to strike, sustained Petitioner's plea of the statute of limitations, and dismissed the case, on the ground that the causes of action created by Section 411 of the South Carolina Code and Section 8236 of Williams Tennessee Code Anno. were the same, and that Section 8595 of Williams Tennessee Code Anno. was a specific limitation on causes of action for death in Tennessee, and was therefore applicable to causes of action arising in South Carolina under Section 411 of the South Carolina Code. (See Opinion Record pages 9 and 10).

On appeal from this decision to the United States Circuit Court of Appeals for the Sixth Circuit, the Circuit Court re-

versed the holding of the District Court and remanded the case for trial on its merits, holding (1) that the causes of action created by Section 411 of the South Carolina Code and Section 8236 of Williams Tennessee Code Anno. were entirely different, the former being a new and separate cause of action for death in the deceased's beneficiaries, the latter being a cause of action for personal injuries in the deceased which survives his death for the benefit of designated beneficiaries: (2) "Where, by statute, a state creates a cause of action for death by wrongful acts and prescribes in the same statute a limitation period for action, such limitation will be applied in the forum of a sister state, even though the period of limitation for like actions in the latter state is shorter"; and (3) that the Tennessee Supreme Court has never passed upon the question of whether the limitation statute Section 8595 of Williams Tennessee Code Anno. applies to a foreign death statute. (See Record page 14 et seq.).

From the action of the Circuit Court of Appeals Petitioner has made application to this Court for Writ of Certiorari.

STATUTES INVOLVED.

a. South Carolina Statutes.

Section 411. "Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person or corporation who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused

under such circumstances as make the killing in law a felony."

Section 412. "Every such action shall be for the benefit of the wife or husband and child, or children, of the person whose death shall have been so caused; and if there be no such wife, or husband, or child, or children, then for the benefit of the parent or parents; and if there be none such, then for the benefit of the heirs at law of the distributees of the person whose death shall have been caused, and shall be brought by or in the name of the executor or administrator of such person; and in every such action the jury may give such damages, including exemplary damages where such wrongful act, neglect or default was the result of recklessness, wilfulness, or malice, as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought. And the amount so recovered shall be divided among the before mentioned parties, in such shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate."

Section 413. "All such actions must be brought within six years from the death of such person, and the executor or administrator, plaintiff in the action, shall be liable to costs in case there be a verdict for the defendant, or non-suit or discontinuance, out of the goods, chattels, and lands of the testator or intestate, if any."

b. Tennessee Statutes.

Section 8236 of William's Tennessee Code Anno. (1934), does not create a new cause of action in the beneficiaries based upon the death of their deceased, but simply preserves the injured party's right of action for personal injuries

which would otherwise be extinguished by his death. Section 8236 is as follows:

> "Right of action for wrongful injuries resulting in death or for wrongful killing does not abate, but passes to whom.—The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and, in case there is no widow, to his children or to his next of kin; or to his personal representative, for the benefit of his widow or next of kin, in either case free from the claims of creditors. (1849-50, ch. 58, sec. 1; 1851-52, ch. 17; 1871, ch. 78 sec. 1.)"

Tennessee, however, has no specific statute of limitations under legislative enactment which applies directly to death cases arising either in Tennessee under Section 8236, or in a foreign state. In the absence of such a statute the Supreme Court of the State of Tennessee, in the case of *H. P. Fowlkes* v. *N. & D. R. R. Co.* (1872) 65 Tenn. (9 Heisk.) 829, has held that Section 8595 of William's Tennessee Code Anno. (1934), which set a limitation of one year on causes of action for personal injuries, is also applicable to the Tennessee Code Section 8236 under which the cause of action of the deceased for personal injuries survives his death. Section 8595 is as follows:

> "One year for libel, personal injuries, etc.—Actions for libel, for injuries to the person, false imprisonments, malicious prosecution, criminal conversation, seduction, breach of marriage promise, and statutory penalties, within one year after cause of action accrued."

The limitation of one year for personal injuries is made applicable to Section 8236 of the Tennessee Code under the case of *H. P. Fowlkes, Admr.* v. *N. & D. R. R. Co., supra,* because the cause of action which accrues is one for personal injury in the deceased, and is simply preserved by Section 8236 for certain designated beneficiaries upon his death. Consequently the limitation of one year runs from the date the cause of action accrues in favor of the deceased, namely, the date he was injured.

The Supreme Court of Tennessee has never passed upon the question of whether this personal injury limitation in Tennessee would apply to a cause of action for wrongful death arising in a foreign state under a statute which creates a new cause of action in the beneficiaries of the deceased, and that comes into existence and accrues to them only upon the death of the deceased, rather than a statute like the Tennessee Code Section 8236, which preserves the right of action the deceased had for personal injuries for the benefit of certain beneficiaries. See the case of *Parsons* v. *American Trust and Banking Company,* 168 Tenn. 49, 73 S. W. (2d) 698. (See Opinion Circuit Court of Appeals Record p. 19). Nor has the Supreme Court passed upon the question of whether the Tennessee Code Section 8595 applies to a foreign death statute of any nature. Neither have counsel for Petitioner in their brief pointed out any case where the Supreme Court of Tennessee has directly passed upon this question.

Tennessee also has a general statute of limitation governing all cases not expressly provided for, namely, Section 8601, which is as follows:

> "Actions against guardians, executors, administrators, sheriffs, clerks, and other public officers on their bonds, actions on judgments and decrees of courts of record of this or any other state or gov-

ernment, *and all other cases* not expressly provided for, shall be commenced within ten years after the cause of action accrued." (Italics ours).

QUESTIONS PRESENTED.

I.

Does the petition for writ of certiorari set forth any proper reason for granting the writ as required by Rule 38 (5) (b) of this Court?

II.

Does the Tennessee limitation of one year for personal injury actions (Sec. 8595) control the time within which action for death caused by wrongful act in South Carolina must be brought in Tennessee under the applicable South Carolina statutes, Sections 411, 412 and 413 of Title 5, Chapter 15, Code of 1932?

More particularly this main question is composed of two parts, decision upon either one of which would determine whether Section 8595 of William's Tennessee Code Anno. (1934) controls the bringing of this action in Tennessee.

These questions are as follows:

1. Whether the South Carolina specific limitation (Sec. 413) of six years for death action arising in South Carolina under Section 411 of the South Carolina Code controls as a matter of right the time within which action can be brought in Tennessee under South Carolina Code Section 411.

2. If some Tennessee statute of limitation must control the action at bar prosecuted under South Carolina Code Section 411, which Tennessee limitation is applicable to the cause of action created in Section 411 of South Carolina Code, Section 8595 or Section 8601 of William's Tennessee Code Anno. (1934)?

SUMMARY OF ARGUMENT

I.

The petition for writ of certiorari is insufficient because it does not set forth any proper reason for the allowance of the writ as required by Rule 38 (5) (b) of this Court.

II.

There is no error in the action of the Circuit Court of Appeals in setting aside the judgment of the District Court and remanding the case for trial on its merits, because,

A. Section 413 of the South Carolina Code of 1932, providing a limitation of six years for actions brought under Section 411 of the South Carolina Code, is a specific limitation set up at the time the new cause of action was created; is a matter of *right* and not a matter of *remedy*, and, therefore, goes with the cause of action created by Section 411 as a matter of right wherever it is sued upon, and is controlling when sued upon in Tennessee,

B. 1. Section 8595 of William's Tennessee Code Anno. is not applicable to the cause of action for death created in Section 411 of the South Carolina Code.

2. If some Tennessee limitation must apply to Section 411 of the South Carolina Code, Section 8601 of William's Tennessee Code Anno. is the applicable statute.

ARGUMENT.

I.

The Petition for Writ of Certiorari is Insufficient Because it Does Not Set Forth Any Proper Reason For Allowance of The Writ as Required by Rule 38 (5) (b) of This Court.

A. The Circuit Court of Appeals for the Sixth Circuit has not rendered a decision in conflict with another Circuit Court of Appeals.

Of the six Circuit Court of Appeals decisions cited by Petitioner as conflicting with the decision of the Circut Court of Appeals in the case at bar, we submit none is even in point, much less conflicting.

1. *Eggens* v. *Canadian Northern Ry. Co.*, 255 Fed. 397, certiorari *granted* 249 U. S. 594, 63 L. Ed. 793, reversed, 252 U. S. 551, 64 L. Ed. 713.—

This case was based upon personal injury and not death, the main question being, whether the Minnesota statute, providing that a cause of action arising in a foreign state and barred by the limitation of the foreign state cannot be sued upon in Minnesota, is repugnant to Article 4 Sec. 2 of the Constitution of the United States.

Tennessee has a similar statute preventing prosecution of actions in Tennessee which are barred in the state where they arose, and the United States Supreme Court settled the constitutionality of such statutes in the case of *Eggens* v. *Canadian Northern Ry. Co., supra.* We submit, however, that this question is not at issue in the case at bar.

Four of the other five Circuit Court of Appeals cases cited by the Petitioner are cases arising out of a statute of the *State* of *Kansas* imposing certain liabilities upon stock holders under specified conditions, but no specific limitation

upon the time for asserting such rights under the statute was set up in Kansas, the applicable Kansas limitation being a general one:

2. *Hutchins* v. *Lamson* (1899) 37 C. C. A. 564, 96 Fed. 720 (certiorari denied in 1903) 189 U. S. 514, 47 L. Ed. 924, 23 Sup. Ct. Ry. 853.—The direct holding of the court in this case was based on procedural grounds. However, the *dicta* upon which Petitioner relies has no bearing upon the case at bar, for the reason that the Kansas limitation in question was a general one and not one specifically relative to the substantive right sued on.

3. *Platt* v. *Wilmot*—118 Fed. 1019, 193 U. S. 602, 48 L. Ed. 809.—No question was raised in this case as to which limitation should apply, since the Kansas and New York limitations were both for three years.—

However, see note to this case p. 809 L. Ed. Vol. 48, in which it appears that the Kansas limitation applicable to the right sued upon was a *general one* applicable to all contracts not in writing, and to all liabilities created by statute other than a forfeiture or penalty.

4. *Ramsden* v. *Knowler*—(1907)—151 Fed. 721.—The court in this case held,

"The exceptional rule that, where a statutory right is given subject to a special limitation, such limitation inheres in the right and follows it into another jurisdiction where it is sought to be enforced to the exclusion of the statute of limitations of the forum, cannot be extended to make the *general statute* of limitations of the state where the liability arose operate extraterritorially."

We fail to see in what manner this holding is in conflict with the decision of the Circuit Court of Appeals in the case at bar, since the South Carolina limitation was a specific one.

5. *Dexter* v. *Edmonds*—(1898)—89 Fed. 467—see top of page 473, where the court points out that the Kansas limitation involved is a *general one* and therefore not operative in a foreign state.

6. *Kansas City Southern Ry. Co.* v. *Maynor* (1913) (C. C. A. 5th Cir.) 209 Fed. 611.

This case involved an action for personal injury which arose in Louisiana and was sued upon in Texas. The Court held that the Louisiana limitation of one year was not applicable in Texas, "to which state the injured party had lawfully removed while the right of action in Louisiana subsisted."

We submit that this decision of the United State Circuit Court of Appeals for the Fifth Circuit is not in conflict with the Circuit Court of Appeals' decision in the case at bar, for the reason that the decision of the Fifth Circuit involved a common law action for *personal injury.*

On the other hand all of the United States Circuit Courts of Appeals which have passed upon this question are in agreement that where, by statute, a state creates a new cause of action either in tort or contract which did not exist at common law and prescribes a specific limitation period for the action either in the same act, or in a different act specifically relative thereto, such limitation will be applied in the forum of a sister state, even though the period of limitation for like actions in the forum state is shorter.

Thereaux v. *Northern Pacific Ry. Co.* 64 Fed. 84
Keep v. *National Tube Co.* 154 Fed. 121
Brunswick Terminal Co. v. *National Bank of Baltimore* 99 Fed. 635.
See also: *Davis* v. *Mills* 194 U. S. 451, 48 L. Ed. 1067.

B. The Circuit Court of Appeals has not decided an important question of local law in conflict with applicable local decisions.—

We submit that the Supreme Court of Tennessee has not passed upon the question at issue here, as will be seen by a reading of *Parsons* v. *American Trust and Banking Co.*, 168 Tenn. 49, 58, S. W. (2d) 698. (See Record p. 19, Opinion Circuit Court of Appeals).

Three of the four Tennessee cases which Petitioner cites as being in conflict with the holding of the Circuit Court in the case at bar, namely *Gassaway* v. *Hopkins*, 38 Tenn. 583, *Barbour* v. *Erwin*, 82 Tenn. 721, and *Fitzsimmons* v. *Johnson*, 90 Tenn. 443 are not death cases, and involve the application of forum limitations to common law actions.

The Fourth case, *Hartman* v. *Duke*, 160 Tenn. 137, is a death case, but the main question at issue there was what law should govern the distribution of recoverable damages in a death case, the law of the state where the accident occurred or the law of the forum. The question of what limitation should apply was not at issue.—

C. The Circuit Court of Appeals, in this case, has not rendered a decision in conflict with applicable decisions of the United States Supreme Court.—

The one United States Supreme Court case cited by petitioner, *Platt* v. *Wilmot, supra,* is, we submit, not in conflict with the decision of the Circuit Court of Appeals, as we have heretofore pointed out, and we have been unable to find any reported decisions of the Supreme Court of the United States in conflict with the holding of the United States Circuit Court of Appeals in the case at bar.

On the other hand, at least one Supreme Court decision has been responsible for the formulation of the rule set out in the case of *Thereaux* v. *Northern Pacific Railway Co., supra,* namely, *The Harrisburg*, 119, U. S. 199, 30 L. Ed. 358.

And in the case of *Brunswick Terminal Co.* v. *National Bank of Baltimore* (1900), 48 L. R. A. 625, 40 C. C. A. (4th Cir.), 22, 99 Fed. 635, (*certiorari denied* in (1900) 178 U. S.

611, 44 L. Ed. 1215, 20 Sup. Ct. Rep. 1029), this Court refused to review a decision of the United States Circuit Court of Appeals for the Fourth Circuit, holding that a Georgia limitation of twenty years specifically applicable to a Georgia statute imposing certain liabilities upon stockholders should govern the time within which a suit based upon such statutory liability could be brought in Maryland, the limitation period in Maryland for like actions being three years, on the ground that "where a statutory liability is sought to be enforced, and the statute prescribes the period of limitation, the law of the forum, where contrary thereto, does not govern."

We submit that the reasoning which motivated the Court to deny the writ of certiorari in the *Brunswick* case alone would amply warrant a denial of the writ in the case at bar.

D. We agree with Petitioner that the questions here involved are certainly important, but we submit that they are not grave questions of public importance involving conflicting decisions between the highest court of the State and the Federal Court sitting in that State.

As pointed out heretofore, the Tennessee Supreme Court has never directly passed upon the question here at issue. See case of *Parsons* v. *American Trust and Banking Co., supra.*

E. We submit that the Circuit Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings, or so far sustained such a departure from a lower court as to call for an exercise of this Court's power of supervision.

F. The Circuit Court of Appeals has not decided an important question of *federal law* which has not been, but should be settled by this Court.

II.

There is no Error in The Action of The Circuit Court of Appeals in Setting Aside The Judgment of The District Court And Remanding The Case For Trial on Its Merits, Because:

A.

SECTION 413 OF THE SOUTH CAROLINA CODE OF 1932, PROVIDING A LIMITATION OF SIX YEARS FOR ACTIONS BROUGHT UNDER SECTION 411 OF THE SOUTH CAROLINA CODE IS A SPECIFIC LIMITATION SET UP AT THE TIME THE NEW CAUSE OF ACTION WAS CREATED, IS A MATTER OF RIGHT AND NOT A MATTER OF REMEDY, AND, THEREFORE, GOES WITH THE CAUSE OF ACTION CREATED BY SECTION 411 AS A MATTER OF RIGHT WHEREVER IT IS SUED UPON, AND IS CONTROLLING WHEN SUED UPON IN TENNESSEE.

There is no conflict in the decisions as to whether a specific limitation set up with a new statutory cause of action for death is a matter of right and limits the life of the new statutory cause of action. See the following cases:

1. *Boyd* v. *Clark*, 8 Fed. 849
2. *Thereaux* v. *Northern Pacific Railway Co., supra*
3. *The Harrisburg*, 119 U. S. 199, 30 L. Ed. 358
4. *Keep* v. *National Tube Co., supra*
5. *Coffman* v. *Wood*, 5 Fed. Supp. 706
6. *The Vestris*, 53 Fed. (2d) 847
7. *Negaubauer* v. *Great Northern Ry. Co.*, 95 Minn. 184, 104 Am. St. Rep. 674.
8. *Weaver* v. *Baltimore & Ohio R. R.*, 21 D. C. 499.

There is a conflict of authority among several state courts over whether a foreign specific limitation longer than a specific limitation for death actions in the forum state shall control over a shorter forum limitation. (For allowing the foreign specific limitation to control: *Negaubauer* v. *Great*

Northern Ry. Co. (Minn.) *supra, Cristilly* v. *Warner* (Conn.) 87 Conn. 461, 88 Atl. 711, *Louisville & N. R. R.* v. *Burkhart,* 154 Ky. 92, 157 S. W. 18; Against allowing the foreign specific limitation to control: *Tieffenbrun* v. *Flannery* (N.C.) 198 N. C. 397, 151 S. E. 857. But we assume that the Court is not at this time particularly interested in any state decisions other than those of South Carolina and Tennessee. On the other hand, the Federal Courts have been in complete accord in developing the rule allowing the longer foreign specific limitation in death actions to govern the time in which the action must be commenced in the forum state as a matter of right, regardless of the fact that forum specific limitation is shorter than the foreign limitation and has expired when the action coming from the foreign state is brought in the forum state. See the following cases:

1. *Thereaux* v. *Northern Pacific R. R. Co., supra*
2. *Keep* v. *National Tube Co., supra*
3. *Coffman* v. *Wood, supra*
4. *Weaver* v. *Baltimore & Ohio R. R., supra.*

The basic reasoning for these decisions is succinctly stated in the case of *Thereaux* v. *Northern Pacific Railway Co., supra.* In the Thereaux case action was brought for wrongful death in Minnesota on a cause of action arising in Montana. Montana had a specific limitation on death actions arising in Montana of three years, Minnesota a specific limitation on death actions arising in Minnesota of two years. Action was brought in Minnesota within three years but after the expiration of two years. In holding the specific limitation of the state where the cause of action arose controlled, the Court made the following statement at page 87:

> "To refuse to entertain such a suit within three years would be to subtract from the liability, and

> to impair the right intended to be conferred by the laws of Montana; for the period allowed in which to enforce the liability, as we have before shown, is a substantial part of the liability imposed and of the right intended to be created. Moreover, it cannot be said that, by entertaining the suit after the lapse of two years, the laws of Minnesota would be set at naught, or any well-defined public policy of that state violated; for, in *contemplation of law,* the two-year limitation prescribed by the statute of that state (chapter 77, Section 2, *supra*) was only intended to apply, and *can only apply, to causes of action, which originate in that state, and not to causes of action that originate elsewhere.* (Italics ours). We are of the opinion, therefore, that the circuit court erred in sustaining the motion for judgment on the pleading."

It is true that the case at bar on the facts does not at first glance fall entirely within the operation of this rule, for the reason that Tennessee, the forum state, has no specific limitation controlling actions for wrongful death arising either in Tennessee, or in a foreign state. However, your Respondent submits that the case of *H. P. Fowlkes, Admr.,* v. *N. & D. R. R. Co., supra,* so confines the application of the Tennessee one year limitation for personal injuries (Section 8595) to survival death statutes in general (that is, death statutes in which the basic cause of action is one for personal injury and not one for death), and in particular, to causes of action for death arising in Tennessee under Section 8236 (which is a survival statute), that the case at bar falls within the reasoning of the cases above cited, particularly the case of *Thereaux* v. *Northern Pacific Railway Co., supra.*

This was apparently the holding of the Circuit Court of Appeals in the instant case of *J. T. Wilson, Admr.,* v. *Massengill* etc., 124 F. (2d) 666, for in that decision the Circuit

Court recognized the fact that the Tennessee Code Section 8236 and the South Carolina Code Section 411, created entirely different causes of action, that Tennessee Code 8595 was a personal injury limitation made applicable only to Tennessee Code Section 8236 by the Tennessee Supreme Court's decision of *H. P. Fowlkes Admr.*, v. *N. & D. R. R. Co., supra,* because it was a survival statute, so that the South Carolina limitation of six years (Section 413), being a part of the right created in South Carolina, could control in Tennessee without violation of any basic public policy of the state of Tennessee, under the rule and reasoning of the case of *Thereaux* v. *Northern Pacific Railway Co.,* supra.

It is, therefore, Respondent's contention that, upon the authority of *Whitlow* v. *Nashville etc., Railroad Co.,* 114 Tenn. (6 Cates) 344, *Sharp* v. *Cincinnati etc., Railroad Co.,* 133 Tenn. 1, at p. 16, and *Hartman* v. *Duke,* 160 Tenn. 134, Tennessee is, under the rules of comity existing between the states, bound to give effect to the *foreign rights* created by the South Carolina statutes, one of which rights is the six year limitation set out in Section 413 of the South Carolina Code, unless Tennessee has some broad public policy which will be infringed by thus giving effect to the foreign right; and that the Federal Courts will enforce this Tennessee principle of conflicts of laws, allowing the South Carolina limitation to control as a matter of right in the case at bar, in view of the fact that no public policy of the State of Tennessee could be enfringed thereby.

> See *Allen-Bradley, Local* v. *Wisconsin Empl't. Rel. Bd.* Vol. 86 No. 11 U. S. Supreme Court Law Ed., Advance Opinion (1942), pp. 802, 806.

In regard to the question raised by Petitioner at page 14 et seq of its brief as to whether the South Carolina Code Section 413 is so worded as to constitute a mere limitation rather than a matter of right: The Supreme Court of South

Carolina has not directly interpreted Section 413 in this connection, but its holding in the case of *Dennis* v. *Atlantic Coast Line R. Co.*, 70 S. C. 254, 49 S. E. 869, 106 Am. State Rep. 746, interpreting a North Carolina limitation statute in a death case arising in North Carolina and sued upon in South Carolina is indicative of the manner in which the South Carolina Supreme Court would interpret Section 413 of the South Carolina Code of 1932.

See also:
Annotation in 67 A. L. R. 1070 to 1075.

B.

1. Section 8595 of Williams Tennessee Code annotated (1934) is not applicable to the cause of action for death created in Section 411 of the South Carolina Code of 1932.

Respondent takes the position that if the forum state has neither a specific nor general limitation applicable to the new cause of action for wrongful death which arose in the foreign state and which bars same, then the foreign specific limitation applies. The general rule governing this situation is stated by Wharton on CONFLICT OF LAWS (3rd Edition), at page 1266, and is as follows:

> "If there is no general or special limitation at the forum applicable to foreign causes of action, the action may doubtless be entertained if the bar of the foreign statute has not fallen."

The case of *Weaver* v. *Baltimore and Ohio R. R.* (1893), 21 D. C., 499, is the leading case on this general proposition. See particularly page 506 et seq.

The importance of the *Weaver* case is found in the Court's insistence that in order to apply certain specified limitations the cause of action sued upon must first be property classified.

In the *Weaver* case the Court reasoned that an action for wrongful death was a tort action, one based upon negligence, and, therefore, was an action on the case, and it was an easy matter to apply the general limitation of three years (Statute of Maryland of 1715) which specifically set a time limit for *all actions on the case*, but which under the facts did not bar the action coming from West Virginia, so that the foreign limitation was given effect. We submit that Section 8595 of the Tennessee Code is not so broad, and creates a limitation only for causes of action for personal injury, which is only one of several actions on the case.

In the case at bar Respondent submits that in order for the Court to apply the Tennessee limitation for personal injuries, Section 8595, it must examine the cause of action created by Section 411 of the South Carolina Code (upon which statute the present action is brought) and find that the cause of action created therein is one for personal injury accruing to the injured party but which survives his death for the benefit of certain designated beneficiaries.

We submit that Section 411 of the South Carolina Code of 1932 is not a survival statute but creates a new cause of action for death which accrues directly to the deceased's beneficiaries the moment the injured party dies.

Wellman v. *Bethea* (S. C.) 243 Fed. 222
Osten v. *So. Ry.*, 76 S. C. 368, 57 S. E. 196
In Re: *Mayo's Estate*, 60 S. C. 401, 38 S. E. 634, 54 A. L. R. 660
Claussen v. *Brothers* (1928) 148 S. C. 1, 145 S. E. 539, 61 A. L. R. 832 at 828-9.

See particularly the cases of *In Re*: *Mayo's Estate supra*, and *Claussen* v. *Brothers, supra*. The *Claussen* case makes very clear the difference between the South Carolina death statute Section 411, and the South Carolina survival statute Section 419.

Under Section 411 the cause of action accrues upon the deceased's death and does not accrue to the deceased, but to his next of kin, the damages assessable being damages which the next of kin suffer because of the death, including the wounded feelings of said beneficiaries, these damages being free from the claims of creditors.

Wellman v. *Bethea, supra*
Claussen v. *Brothers, supra*

More specifically, under Section 411 when the deceased dies a liability is created which is enforceable only by his personal representative on behalf of the deceased's next of kin.

Grainger v. *Greeneville S. & A. Ry.*, 101 S. C. 399, 85 S. E. 968.

It is true, however, that under Section 419 of the South Carolina Code (See Appendix), the deceased has a cause of action for personal injuries which, upon his death, survives, and the damages assessable thereunder are based upon the deceased's personal suffering etc., and are subject to the claims of creditors.

Grainger v. *Greeneville S. & A. Ry., supra*
Bennett v. *Spartanburg Ry. Co., etc.*, 97 S. C. 27, 81 S. E. 189.

But they are separate and distinct, and judgment on one is not *res adjudicata* as to the other.

Grainger v. *Greeneville, supra*
Bennett v. *Spartanburg*, supra

As a matter of fact, these two separate causes of action cannot be joined in the same complaint.

Grainger v. *Greeneville, supra*
Bennett v. *Spartanburg*, supra

It is true that there is an element of injury in every wrongful death action, and by the statute creating a cause of action for death the right attaches only if the person wronged could have sued in his life time; and in South Carolina, under Section 414 (See Appendix), if the deceased in his life time executes a release for his injuries, or recovers a judgment for same, the right of action for death created by Section 411 does not come into existence in order to prevent a double recovery. However, South Carolina has held that, when death occurs without any prior release or judgment, by virtue of Section 411 and 419 two separate and distinct causes of action come into being, notwithstanding Section 414, one for death and one for personal injuries which survives the death of the injured party. See the case of *In Re: Mayo's Estate, supra.*

We would like to point out here that Section 414 does not apply to Section 419, but only to Section 411, since Section 419 simply provides for the survival of a cause of action for personal injuries which upon a recovery by the deceased for injuries prior to his death would cease to exist. The mere fact that the South Carolina Legislature deemed it necessary to enact Section 414 indicates that they considered Section 411 as a completely new cause of action which had no relation to the right of action for personal injuries in the deceased.

However, Section 8236 of Williams Tennessee Code Anno. (1934) does *not* create a new cause of action but simply preserves the cause of action for personal injury in the deceased which would otherwise be extinguished by his death.

H. P. Fowlkes, Admr. v. *N. & D. R. R. Co.*, supra
Whaley v. *Catlett*, 103 Tenn. 347, at 351 et seq., 53 S. W. 131
Love v. *Southern Ry.*, 108 Tenn. 104, at 125
Davidson Benedict Co. v. *Severson*, 109 Tenn. (1 Cates) 572, at 589
Elliott v. *Felton*, 119 Fed. 270, at 274 et. seq.

At page 351 the Court, in the case of *Whaley* v. *Catlett*, *supra*, makes the following statement:

> "We are of opinion that a careful reading of the statutes can lead to no other conclusion than that they provide alone for the continued existence and passing of the right of action of the deceased, and not for any new, independent cause of action in his widow, children, or next of kin."

Under the case of *H. P. Fowlkes, Admr. N. & D. R. R. Co.*, *supra*, Section 8595 of the Tennessee Code is made applicable to Section 8236 of the Tennessee Code simply because the cause of action is for the personal injury of the deceased, and *accrues* to the deceased when he is injured. And under the *Fowlkes* case the limitation begins to run, not from the date of the injured party's death, but from the date he is injured. However, the cause of action created by Section 411 of the South Carolina Code does not accrue until the injured party dies and the cause of action does not accrue then to the injured party, but directly to his beneficiaries, and is a cause of action for death, not one for *personal injury*.

We submit that in determining what the basic cause of action is for the purpose of applying specified statutes of limitation it is necessary to determine when and to whom the cause of action accrues. See the case of *Federal Reserve Bank* v. *Atlanta Trust Company* (1937) 91 Fed. (2d) 283, 117 A. L. R. 1160. See also the case of *Whaley* v. *Catlett*, *supra*, p. 355 et seq.

Under the reasoning of the case of *Federal Reserve Bank* v. *Atlanta Trust Company*, *supra*, the cause of action sued upon in the case at bar, as created by Section 411 (S. C. Code), does not come into existence until the injured party dies. Consequently, the right claimed is not a right in the deceased based upon his cause of action for personal injury, but a right of the beneficiaries based upon the death of the

injured party. The right claimed is the pecuniary loss to the beneficiaries caused by the death of the injured party, and not the deceased injury; and not until the injured party dies, can the action be brought under Section 411, and not until the injured party dies does the South Carolina limitation (Sec. 413) of six years begin to run.

It is true that even under Section 8236 of Williams Tennessee Code Anno. suit cannot be brought until the injured party dies. But even then the right of action is still the right of the deceased for his personal injuries. In the case of *Whaley* v. *Catlett, supra,* the court makes the following statement at page 352:

> "In *Haley* v. *Railroad,* 7 Bax., 242, it is held that the right of action of the deceased, with all its incidents, passes, (to the personal representative) and it must be treated as if the injured party had brought it. And again, in *Loague* v. *Railroad,* 7 Pick., 460-462, it is held that the right of action is still the right of the deceased, although under Section 4029, Act of 1883, Ch. 186, the recovery may include as an element such damages as are sustained by the person to whom the statute gives the recovery."

And by the decision in the case of *H. P. Fowlkes, Admr.* v. *N. & D. R. R. Co., supra,* it is clear that the cause of action accrues before death and accrues, not to the beneficiaries, but to the injured party, and is a cause of action for *personal injury* in the deceased which survives for the benefit of his next of kin, at least for the purpose of applying Section 8595 thereto. See case of *Whaley* v. *Catlett, supra,* at page 355 et. seq.

We submit, therefore, that the causes of action created by Tennessee Section 8236 and South Carolina Section 411 are two separate and distinct causes of action. The first is a cause of action for *personal injuries* accruing to the in-

jured party and which is simply preserved by statutory enactment after his death. The second is a cause of action for death itself which accrues directly to the deceased's beneficiaries, but not until the injured party dies. We submit, therefore, that since Section 8595 of the Tennessee Code is a limitation on causes of action for personal injury it is not applicable to Section 411 of the South Carolina Code which creates a cause of action for death.

2. IF SOME TENNESSEE LIMITATION MUST APPLY TO SECTION 411 OF THE SOUTH CAROLINA CODE, SECTION 8106 OF WILLIAMS, TENNESSEE CODE ANNO. IS THE APPLICABLE STATUTE.

Section 8601 is a general statute of limitations and is as follows:

> "Actions against guardians, executors, administrators, sheriffs, clerks, and other public officers on their bonds, actions on judgments and decrees of courts of record of this or any other state or government, and *all other cases* not expressly provided for, shall be commenced within *ten years* after the cause of action accrued." (Italics ours)

This Code Section 8601 must be read with Tennessee Code Section 8592, and reading these two sections together it is clear that the only general limitation in Tennessee is this ten year limitation which applies to "all other cases not expressly provided for." See the case of *Barnes* v. *Barnes*, 157 Tenn. 332, 336-37-38.

Section 8592 is as follows:

> "All civil actions, other than those for causes embraced in the preceding article, shall be commenced after the cause of action has accrued, within the periods prescribed in this chapter, *unless otherwise expressly provided.*" (Italics ours).

We submit that Section 8601 is broad and general enough to cover the case at bar brought upon Section 411 of the South Carolina Code and, as a matter of fact, is the only Tennessee limitation which is applicable to Section 411. And, if any Tennessee limitation must control the action at bar, we submit that it is this general limitation statute, Section 8601.

Since Respondent's cause of action under Section 411 of the South Carolina Code is still in existence (the six year provided for in Section 413 of the South Carolina Code not having expired), and the limitation of Section 8601 (Tenn. Code) is for ten years, we submit that the instant case is not barred but must be given a hearing on its merits.

It is therefore submitted that the petition for writ of certiorari should be denied.

Respectfully,

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